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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	
NO. 54693-g410 BY RONALD AND)	NOTICE OF ERRATUM
LYLE OTNESS)	

* * * * *

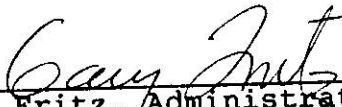
The Final Order dated February 2, 1990, in the above-entitled matter contained an error in the point of use on page 2. The Final Order reads as follows:

. . . new irrigation of 160 acres located in the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ of Section 32, Township 25 North, Range 2 West.

The Final Order should be corrected to read as follows:

. . . new irrigation of 160 acres located in the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ of Section 32, Township 25 North, Range 4 West.

Dated this 13 day of April, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Erratum was duly served upon all parties of record, at their address or addresses this 13th day of April 1990, as follows:

Ronald and Lyle Otness
P.O. Box 726
Choteau, MT 59422

John J.A. Wisse
Route 2
Choteau, MT 59422

CASE # 54693

Kenneth C. Rice
Elaine M. Rice
Box 164A, Route 2
Choteau, MT 59422

K. Dale Schwanke
Jardine, Stephenson,
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P.O. Box 2269
Great Falls, MT 59403-2269

Charles M. Joslyn
Attorney at Law
No. 21, Larson Building
Choteau, MT 59422

Bill Uthman, Hydrogeologist
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301

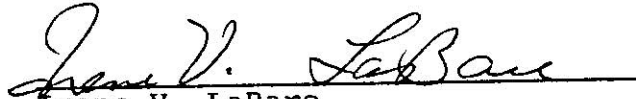
Bob Larson
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P.O. Box 1828
Havre, MT 59501

William O. Chalmers
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John R. Christensen
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John E. and Helen Oberfoell
P.O. Box 119
Choteau, MT 59422

Duane Johnson
North of Choteau
Choteau, MT 59422


Irene V. LaBare
Legal Secretary

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 54693-g410 BY RONALD AND)	
LYLE OTNESS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Revised Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 20, 1989 Revised Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, Application for Beneficial Water Use Permit No. 54693-g410 is hereby granted to Ronald and Lyle Otness, to appropriate 110 gpm up to 89.44 acre-feet per year, from April 1 to October 1, inclusive, each year, of groundwater diverted by tile drain system located in the W $\frac{1}{2}$ of Section 32, Township 25 North, Range 4 West, to be used for supplemental and

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new irrigation of 160 acres located in the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ of Section 32, Township 25 North, Range 2 West.

This Permit is issued subject to the following express conditions, limitations, and restrictions:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for Permit uses.


D. Permittee shall install adequate flow measuring devices at the point(s) water is removed from the Otness ditch. Permittee shall keep written records of the flow and volume diverted by recording each date on which water is diverted, and the rate and duration of diversion on each such date. Permittee shall provide such records to the Department upon request.

E. In the Notice of Completion, Permittee shall describe with particularity the acreage to which water has been applied hereunder.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 2 day of February, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 2nd day of February, 1990, as follows:

Ronald and Lyle Otness
Box 726
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John J.A. Wisse
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Kenneth C. & Elaine M. Rice
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Bill Uthman, Hydrogeologist
Department of Natural
Resources & Conservation
1520 East 6th Avenue
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(interdepartmental mail)

John E. and Helen Oberfoell
P.O. Box 119
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Duane Johnson
North of Choteau
Choteau, MT 59422


Irene V. LaBare
Legal Secretary

CASE # 54693

B. J.

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	
NO. 54693-g410 BY RONALD AND)	REVISED PROPOSAL
LYLE OTNESS)	FOR DECISION

* * * * *

Pursuant to remand, the Examiner has reconsidered the file and record in this matter in light of the Administrator's determination that the present application is for any unappropriated water in the source, rather than for just that water which Applicant has developed. Accordingly, the Examiner hereby revises his Proposal for Decision. The Findings of Fact, Conclusions of Law, and Proposed Order set forth in the December 20, 1988 Proposal for Decision are incorporated herein by reference, except as specifically modified below.

MODIFICATIONS TO PROPOSAL

1. Insert new Finding of Fact #21:

21. Department records show four Claims of Existing Irrigation Water Rights on McCormick Coulee, Nos. W213077-410, W36078-410, W36074-410, W36077-410, all four together claiming a total volume of 1120 acre-feet diverted annually.

2. Delete Conclusion of Law #8. Insert new Conclusion of Law #8:

8. The Examiner has adopted the estimates of flow in McCormick Coulee made by the hydrogeologists as fact. However, even assuming arguendo that the Otness estimates

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of water in McCormick Coulee (2200 gpm) were true (rather than the estimates of the Department hydrogeologists), the evidence does not show that any of the natural flow (as distinguished from the flow developed by Otness) of McCormick Coulee is unappropriated.

All claimed existing irrigation rights on McCormick Coulee together require 1120 acre-feet per annum. Thus, even at 2200 gpm (the flow rate alleged by Otness to be the flow rate of the Coulee as it leaves his property), it would take almost four months to fill existing downstream senior McCormick Coulee irrigation rights. As there is nothing in the record showing that these claimed existing rights are either overstated or are not fully utilized every year, it therefore cannot be concluded that any of the natural flow of McCormick Coulee during the irrigation season, even if it were to approach 2200 gpm, is unappropriated water. See In re Hadley, 60662; In re Cutler, 56782, 56830, In re Powers, 38484, and In re MacMillan, 42666. Accordingly, no permit to appropriate any of the natural flow of McCormick Coulee (which natural flow includes flow coming from the tiles which would become the part of the flow of the Coulee whether the tiles had been installed or not) can issue.

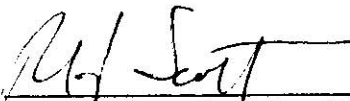
NOTICE

This revised proposal may be adopted as the Department's final decision unless timely exceptions to the revisions are filed as described below. Any party adversely affected by this Revised Proposal for Decision may file such exceptions with the Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20

days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 20 day of December, 1989.


Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6610

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Revised Proposal for Decision was duly served upon all parties of record at their address or addresses this 2nd day of ~~December, 1989,~~ ^{January, 1990,} as follows:

Ronald and Lyle Otness
Box 726
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John J.A. Wisse
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Kenneth C. & Elaine M. Rice
Box 164 A, Route 2
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Bob Larson
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K. Dale Schwanke
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William O. Chalmers
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Charles M. Joslyn
No. 21, Larson Bldg.
Choteau, MT 59422

John R. Christensen
P.O. Box 556
Stanford, MT 59479

CASE # 54693

Bill Uthman, Hydrogeologist
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301
(interdepartmental mail)

John E. and Helen Oberfoell
P.O. Box 119
Choteau, MT 59422

Duane Johnson
North of Choteau
Choteau, MT 59422



Irene V. LaBare
Legal Secretary

CASE # 54693

66

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	NOTICE OF REMAND
NO. 54693-g410 BY RONALD AND)	
LYLE OTNESS)	

* * * * *

On December 20, 1988, the Department Hearing Examiner submitted a Proposal for Decision in this matter. The Proposal recommended that Application for Beneficial Water Use Permit No. 54693-g410 be partially granted for 110 gpm up to 89.44 acre-feet per year, from April 1 to October 1, inclusive, each year, of groundwater diverted by tile drain system located in the W $\frac{1}{2}$ of Section 32 $\frac{1}{2}$, Township 25 North, Range 4 West, to be used for supplemental and new irrigation of 160 acres located in the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ of Section 32, Township 25 North, Range 4 West, since the Applicant made no showing that the flows which existed in the Otness drain ditch before installation of the tiles constituted developed water. The Application was therefore considered as a request to appropriate only the increase in flow on the Otness drain ditch causes by installation of the drain tile system, not as a request for the entire flow of the Otness drain ditch. (Proposal at page 17.) The Applicant filed exceptions to the Proposal and requested that oral arguments be held. Objectors

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Kenneth C. and Elaine M. Rice filed exceptions and William O. Chalmers filed exceptions and requested oral arguments. An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on May 16, 1989. Present at the hearing were the Applicants Lyle and Ron Otness and their attorney, K. Dale Schwanke. Objector William O. Chalmers and his attorney, Charles M. Joslyn were present. George Hodgekiss of Choteau, Montana, who recently purchased the Rice property appeared at the hearing on his own behalf.

Upon review of the evidence herein and consideration of the arguments presented at the oral argument by the parties, I concur with the Findings of Fact and Conclusions of Law of the Hearing Examiner except for the Conclusion of Law No. 8. The Application specifies groundwater, not developed groundwater, and it is clear from the record that the Applicant intended to appropriate all unappropriated water (up to 1,250 gpm) produced by his tiles, including such groundwater as is destined to become surface water in McCormick Coulee whether or not the tiles are in place. Applicant attempted to show that the requested amount of water, developed or not, was available in McCormick Coulee. (Tr. pp. 8, 9, 40, 41, 43, 44, 47, 50, 51, 59, 131, 132.) Therefore, Conclusion of Law No. 8 is erroneous.

Because of the mistaken assumption concerning Applicant's intent and efforts, I remand this case to the Hearings Unit for reexamination of the evidence concerning whether there is un-

appropriated water in McCormick Coulee other than that clearly developed by the tile system.

Dated this 7 day of November, 1989.


Laurence Siroky, Assistant Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6610

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Remand was duly served upon all parties of record at their address or addresses this 7th day of November, 1989, as follows:

Ronald and Lyle Otness
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Robert H. Scott
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620


Irene V. LaBare
Legal Secretary

B U

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 54693-g410 BY RONALD AND)
LYLE OTNESS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 14, 1988 in Choteau, Montana.

Applicants Ronald and Lyle Otness appeared pro sese.

Objector John Wisse appeared pro se.

Objector William O. Chalmers appeared in person and by and through Charles Joslyn, attorney at law.

Objectors Kenneth C. and Elaine M. Rice (hereafter, "Objector Rice") appeared by and through John Christensen, attorney at law.

Successor-in-interest to Objector Donald J. Depner, Duane Johnson, appeared in person and by and through John Christensen, attorney at law.

Above-said Kenneth C. Rice appeared as witness for Objectors Rice and Johnson.

Louis Depner appeared as witness for Objectors Rice and Johnson.

Darell Stott appeared as witness for Objectors Rice and Johnson.

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Ray Anderson appeared as witness for Objectors Rice and Johnson.

Duane Johnson appeared as witness for Objectors Rice and Johnson.

Charles Joslyn, attorney at law, entered the late objection of John and Helen Oberfoell. The Oberfoells did not appear in person.

Bill Uthman, hydrogeologist with the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), appeared as DNRC staff expert witness.

Bob Larson and Marvin Cross, Field Manager and Agricultural Specialist, respectively, with the Havre Field Office of the DNRC Water Rights Bureau appeared as staff witnesses.

The record closed at the end of the hearing, except for on-site observations made by the Examiner.

EXHIBITS

Applicant offered three exhibits for the record.

Applicants' Exhibit 1, a photocopy of an aerial photograph of Section 32, Township 25 North, Range 4 West, Teton County, Montana, with colored markings denoting locations of various canals and ditches, was admitted without objection.

Applicants' Exhibit 2, a photocopy of an aerial photograph of Section 32, Township 25 North, Range 4 West, with notations in blue ink regarding irrigation of said section, was admitted without objection.

Applicants' Exhibit 3, a large piece of cardboard with a handdrawn facsimile of a certain area of Township 25 North, Range 4 West, which includes the location of certain canals and ditches located therein, was admitted without objection for demonstrative purposes.

Objector Chalmers offered no exhibits.

Objector Wisse offered no exhibits.

Objectors Rice and Johnson offered 21 exhibits.

Objectors Rice and Johnson Exhibits A through U, photographs of the vicinity of the Teton County Drain Ditch (also referred to as the "Highway Ditch"), were admitted without objections.

There was no objection to the contents of the Department file.

PRELIMINARY MATTERS

At the hearing, Applicant moved to amend the Application to reflect his intent to flood irrigate rather than sprinkler irrigate, and to change the description of the proposed place of use. Such motion was opposed by Objectors who assert that the proposed amendment substantially changes the Application, and that they were therefore not given adequate notice to properly prepare for hearing on the amended Application.

The Examiner finds that the sprinkler to flood irrigation alteration does not constitute an amendment, as method of application was not specified either in the original Application or in the public notice thereof. However, the Examiner denies the motion to amend the description of the proposed place of

use, as the amendment would substantially change the Application and because Objectors did not have sufficient notice of the amendment.

FINDINGS OF FACT

1. Section 85-2-302, Montana Code Annotated (hereafter "MCA"), provides that, with certain exceptions (inapplicable in this matter), "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. The Application in this matter was regularly filed on April 17, 1984 at 10:00 a.m.

3. The Application is made for a permit to divert, from April 1 to October 1, inclusive, each year, 1250 gpm up to 200 acre-feet per year of groundwater produced by means of a groundwater drain tile system located in the W $\frac{1}{2}$ of Section 32, Township 25 North, Range 24 West, Teton County, Montana, said groundwater to be used for new and supplemental irrigation of 160 acres located in the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ of said Section 32.

4. The pertinent parameters of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on June 29 and July 5, 1984. Timely objections were received from Donald J. Depner, John Wisse, William O. Chalmers and Kenneth and Elaine M. Rice.

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5. Objector Rice claims an existing water right (No. D15-s-410), priority date June 01, 1952, in and to 6 cfs up to 280 acre-feet per year of surface water diverted from a certain drain ditch, which drain ditch was installed in 1948 and is owned and operated by Teton County. Said drain ditch (also referred to as the "Rice drain ditch" or the "highway ditch") average 2½ feet in depth and is approximately 2 miles in length. It begins at approximately the SE corner of Section 31, Township 25 North, Range 6 West, and runs due north along the west side of the county road to the NE corner of Section 30, Township 25 North Range 4 West. The claimed means of diversion is a headgate located near the lower end of the highway ditch in the SW¼SW¼SW¼ of Section 20, Township 25 North, Range 4 West. Objector Rice alleges Applicants' drain tile system adversely affects this water right by lowering the water table under the highway drain ditch thereby reducing the flow intercepted by said ditch, and ultimately reducing the flow diverted at the Rice headgate.

6. Objector Chalmers claims several existing water rights (Claim Nos. 410-W036065 through 410-W036067 and 410-W036069 through 410-W036071, inclusive, and 410-W36074 through 410-W36078, inclusive), some of which are for groundwater diverted by well, or from springs, and some of which are for surface water diverted from McCormick Coulee. Late Objector Oberfoell claims an existing water right (No. 410-W47007) for groundwater and an exempt stockwater right. Both Objector Chalmers and late Objector Oberfoell allege that the proposed

appropriation will adversely affect these rights by reducing the flow of water in (and under) McCormick Coulee.

7. Objector Wisse owns several Certificates of Water Right (Nos. 47975-g410 and 18239-g410) and one exempt right (No. 410-E38096), and claims one right (No. 410-W044160), all for groundwater diverted to the east of Applicant's drain tile system. Objector Wisse alleges that the tiles adversely affect his groundwater rights.

8. Objector Duane Johnson, successor-in-interest to Objector Donald J. Depner, owns two Certificates of Water Right (Nos. 16538-g410 and 16246-g410) and a Permit to Appropriate (No. 25-g410), all for groundwater diverted to the north of Applicants' drain tile system. Objector Johnson continues the Depner objection that operation of the tiles adversely affects these groundwater rights.

9. Historically, Applicant's property (Section 32) has been affected by a high water table. This high water table has reduced the agricultural utility of the land, by creating swampy conditions and generally impairing its ability to grow valuable plants. In 1959, Applicant installed an open drain ditch (Otness ditch) across Section 32. (All or part of this ditch apparently is an excavation of the upper portion of McCormick Coulee.) From 1959 on, the water table under that portion of Section 32 lying south and east of the Otness ditch has been sufficiently low that valued plants will grow. However, the ditch has had no effect on the groundwater table to the north and west of the ditch. Otness

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has not claimed (in the statewide adjudication) a water right for water collected in the Otness ditch, nor does he presently possess a permit to appropriate said water.

10. In 1983, Applicant commenced installation of a drain tile system, the main collecting component of which consists of a north-south trending tile drain (main drain) located in Section 32 parallel to, and immediately to the east of, the county highway; this component is connected to three east-west trending lateral tile drains which empty into the Otness ditch. Installation was completed in 1984.

The tile drain system intercepts a portion of the water which previously would have been first intercepted by the Otness ditch, thereby successfully lowering the average water table in that portion of Section 32 lying north and west of the Otness ditch. The tile system also lowered the average water table for some distance to the west of the county highway, thereby reducing the amount of water annually collected in that portion of the highway ditch which lies to the west of Section 32.

11. There is always a substantial flow of water in the Otness ditch during the irrigation season. However, the empirical evidence will not allow quantification of the increase in flows in the Otness ditch (if any) caused by installation of the tile drain system.

Applicant asserts that a relatively constant 2200 gpm now flows in the drainage system. This figure was arrived at by measuring water depth monthly at the point where the Otness ditch

enters a culvert located at the east edge of Section 32, the water depth having been equated with a specific flow rate by an employee of the Soil Conservation Service (not present at the hearing). There is, however, no empirical evidence regarding the flow of water which had been produced by the Otness ditch prior to the installation of the tiles. Therefore, no comparison of actual ditch flow before the tile installation with actual flow thereafter can be made.

12. The Department hydrogeologist has provided a theoretical determination that the maximum amount of water contributed to the Otness drain ditch by the tile drain system is 110 gpm.

Output of the three lateral drains was measured on January 3, 1985 and found to be 110 gpm. Using Darcy's equation, this figure was correlated with the static groundwater level, also measured on that day, and the hydraulic conductivity of the medium (soil) was calculated. Using this calculated value, it was determined that the net increase in Otness ditch flow caused by the tiles (new flow) is a maximum 110 gpm. This increase is due to the fact that the tiles were placed at an average depth of 5.8 feet, thus enabling them to intercept water from greater depths than could the Otness ditch, which averages only 5 feet in depth. The change in location of the main intercepting structure did not in itself result in any significant increase in production.

13. Although Figure 1 of the hydrogeologist's report indicates that the percentage of flow constituting new flow in

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the Otness ditch decreases with increasing water table height, critical evaluation of the report shows the net increase in flow in the Otness ditch due to installation of the drain tiles remains a relatively constant 110 gpm at any water table level higher than 5 feet below ground surface.

Because the Otness drain ditch is longer (5,984') than the tile system (5,148'), it can intercept more water per unit depth (at depths above 5 feet) than can the tile system. This advantage, however, is offset by the tile system's ability to collect water at depths below 5 feet. Accordingly, if it is assumed (as it was by the hydrogeologist) that the tile system collects all water which would previously have been intercepted by the Otness ditch, it will appear as if the flow of the Otness ditch after installation of the tiles increases less per unit increase in water table level than it did prior to installation of the tiles. See Department file: Harrison memo, Figure 1. Said assumption, however, is erroneous.

The tile drain is shorter than the Otness ditch. Therefore, it follows that the tile drain will not intercept all of the water formerly first intercepted by the Otness ditch. However, the water not intercepted by the tiles does not simply disappear, but continues to flow downgradient, ultimately entering the still-existing Otness ditch. As Figure 1 does not take into account this "fugitive" water, there will always be more water in the Otness ditch when the water table is higher than 5 feet below the surface than is indicated in said Figure; i.e., the

graph of "McCormick Coulee flow with tile drain", will rise more quickly than indicated. ("McCormick Coulee" as used in the memo is equivalent to "Otness ditch" as used herein.) Recalculation after correcting for the erroneous assumption shows that an additional 110 gpm will always be produced regardless of how shallow the water table is.

14. Otness objects to these theoretical calculations, maintaining that all of the hydrogeologist's figures are low because his measurements were taken during a dry year, without benefit of irrigation recharge. Nevertheless, the record shows that these variables were accounted for. The low output of the tiles was correlated with the concurrent water table level (which was also low, presumably due to the dry conditions) in order to arrive at the hydraulic conductivity. This is a constant value, independent of the moisture content of the soil, which allows calculation of flow for any water table level. Therefore, Otness' objection is without merit.

15. Otness has measured flows in his drain ditch which he believes to be 2200 gpm. The Department hydrogeologist's theoretical determination, however, predicts a maximum drain ditch flow of about 800-900 gpm. Given this record, these figures are irreconcilable; therefore, the Examiner is left with the decision as to which one is more accurate.

One challenge was made by Applicant to the hydrogeologist's calculations. This was found meritless. See Finding of Fact 14. One erroneous assumption was made by the hydrogeologist. It was

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easily rectified. See Finding of Fact 13. No other significant faults were found in the hydrogeologist's determination, despite the fact that an expert witness was present at the hearing who could then and there have been interrogated at length about it. Applicant's measurements, on the other hand, were calibrated by a person who was not present at the hearing and was thus not available for questioning as to his methods. The accuracy of the flow measurements could therefore not be verified. Accordingly, the Examiner finds that the hydrogeologist's deductions, although admittedly theoretical and somewhat imperfect, are more reliable than Applicant's unverified calibrations. The Examiner therefore adopts the hydrogeologist's estimates as rectified. See Finding of Fact 13.

16. Any flow in the Otness ditch up to 110 gpm is the product of the drain tile system. When flows in the Otness ditch are over 110 gpm, 110 gpm is the product of the drain tile system.

17. Assuming continuous diversion of 110 gpm throughout the proposed period of use, a total volume of 89.44 acre-feet would be diverted during said period.

18. Whether Otness increased the flow in McCormick Coulee in 1959 with the installation of the Otness drain ditch cannot be determined based on the record. Although the record shows that the Otness drain ditch itself does intercept water (Department file: February 1, 1985 to January 16, 1986 memoranda), it cannot be determined whether all, or a portion, of such flows had

entered McCormick Coulee before the construction of the Otness ditch. However, the 110 gpm of new water now intercepted by the tile drain system could not have entered McCormick Coulee prior to 1984 because groundwater flow at depths below the level of the Otness ditch moves to the east, not to the north, as it would have to in order to be intercepted by the portions of McCormick Coulee which are deeper than the Otness ditch.

19. The Otness drain tile system has been in continuous operation since 1984. Since 1984, neither Objector Wisse nor Objector Johnson has noticed any change in his groundwater wells.

20. There is no evidence of other planned uses or developments from this source for which a permit has been issued or water reserved.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Hearing Examiner.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-311(1), MCA, are met:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;

- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The Department has no jurisdiction regarding the existence of the Otness drain tile system, and can therefore neither sanction its use for drainage, nor compel its removal; however, because application for use of the water produced by the system has been made, the Department does have authority to deny issuance of a Permit to appropriate water diverted by said drain tiles if such diversion does not comply with the requirements of § 85-2-311, MCA, e.g., adversely affects the water rights of other appropriators, or, *mutatis mutandis*, to grant the Permit.

5. Regarding the alleged adverse effect to Rice's claimed water right, the record shows that the installation of the Otness tile system has at least contributed to the reduction in flow in the highway ditch by lowering the groundwater table in the vicinity of the southern-most mile of said ditch. (Finding of Fact 10.) This reduction has resulted in less flow available to Objector Rice, who diverts waste water from the north end of that

ditch. However, such reduction does not, as a matter of law, constitute adverse effect to the Rice water right.

Teton County owns and operates the highway drain ditch. The purpose of the ditch is to dispose of water for protection of the highway. The water thereby generated is considered waste water. In Montana, prior to 1921, no water right could be established in flood, seepage or waste water as such, Popham v. Holloran, 84 Mont. 442 (1929); but, legislation passed that year authorized the establishment of such rights. Section 7093, Rev. Codes of Montana (1921). However, any water right which includes waste water as (part of) its source is inherently a more limited right than is a right to water occurring naturally, for the appropriator of waste water can neither expect nor compel the continuance of the waste, but only that it will not be discontinued maliciously or arbitrarily. Newton v. Weiler, 87 Mont. 164 (1930).¹

¹ Under whatever auspices water is rightfully reduced to possession, when water is reduced to possession, the corpus is considered personalty, and is therefore subject to the law of personalty. Personalty can be abandoned and subsequently taken up by another; however, the appropriator of abandoned personalty acquires no usufructuary right to compel future abandonments. He can only take what is abandoned, when it is abandoned. See 1 Wiel, Water Rights in the Western States (1911), pp. 54-58.

Waste water is water which has been reduced to possession and subsequently abandoned. Accordingly, whatever the nature of a water right reliant on waste (whether the waste is diverted before or after it is comingled with a natural source), such a water right does not include the right to a continuing supply of waste. Hagerman Irr. Co. v. East Grand Plains Drainage District, 25 N.M. 649, 187 P. 555, 558 (1920); see also Fairplay v. Weston, 29 Colo. 125, 67 P. 160; Cardelli v. Comstock T Co., 26 Nev. 284, 66 P. 950; Crescent etc. Co. v. Silver King etc. Co., 17 Utah 444, 54 P. 244.

(It has been suggested that the 1921 statute effected a

The pivotal question is whether Applicant's diversion of water adversely affects Objector's water right. Clearly, the tile drain system is a cause of the reduction in the amount of waste water available to Objector. However, such reduction constitutes an adverse effect to the Rice waste water right only if it is engendered maliciously or arbitrarily.²

By installing the tile drain system, Otness has incidentally relieved Teton County of the necessity of operating the drain ditch (at least, in part). Under the changed circumstances, the County may not wish to operate the ditch as before, for to do so would be meaningless. However, that the resultant deprivation is neither arbitrary nor malicious is apparent, for it is obviously in the County's interest to have the land near the highway drained by the tiles (rather than to have to maintain the highway ditch).

Because the deprivation of water is neither malicious nor arbitrary, and because a waste water right does not otherwise include the right to a continued flow of waste water, it cannot

departure from the common law sufficient to grant the post-1921 appropriator of waste a usufruct in the waste generator's source. See Stone, Montana Water Law for the 1980s (1981), p. 35. Such a departure, however, has not thus far been recognized by the Court - perhaps wisely, considering the complex of waste accretions which may contribute to a given water supply.)

² It must be noted that if the highway drain ditch were operated by Rice as a means of diversion of groundwater for his beneficial use, his water right would be a right in and to groundwater, not waste; i.e., it would be a usufructuary right, and he would therefore be entitled to have the source remain in substantially the same condition as it was at the time of initial diversion. However, such is not the case here. See Objector Rice's Claim of Existing Right, Finding of Fact 6.

be said that the reduction in highway ditch flow occasioned by Applicant's tile drain system adversely affects Objector Rice's water right. The Examiner thus concludes that Applicant's proposed appropriation of water will not, as a matter of law, adversely affect the Rice water right.

6. Neither the water rights of Objectors Johnson nor those of Objector Wisse will be adversely affected by the proposed appropriation. (Finding of Fact 19.)

7. Regarding the alleged adverse effect to Objector Chalmers' and late Objector Oberfoell's water rights, it must first be pointed out that a prior appropriator is not entitled to water which someone else has developed and added to the source. Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135 (1906). Thus, any increase in the flow of McCormick Coulee caused by the installation of the drain tiles, that is, which would not have existed in the Coulee without the tiles, is exclusively appropriable by Otness. Otness has developed, i.e., removed from the groundwater system where it would previously have remained unavailable to prior appropriators relying on water which flows in and under McCormick Coulee, 110 gpm. Accordingly, neither the Chalmers nor the Oberfoell water rights will be adversely affected if Applicant's appropriation is limited to that water which he has developed.

8. Applicant did not attempt to prove the existence of unappropriated water in McCormick Coulee other than that which was allegedly developed by his efforts. However, there is a

question as to the amount of developed water supplied to the Coulee by Applicant's efforts.

The Application ambiguously states that the water Applicant seeks to appropriate is water which is produced by his drain tile system. As a portion of the water formerly intercepted by the Otness ditch is now first intercepted by the tiles then added to the ditch, it is possible that Applicant may intend to appropriate water which flowed in the Otness drain ditch prior to tile installation; i.e., it appears he may actually seek the entire production of the ditch and tile system, not just the increase in Otness ditch flow caused by installation of the tiles.

Applicant made no showing that the flows which existed in the Otness drain ditch before installation of the tiles constituted developed water.⁴ Therefore, the Application will be considered as a request to appropriate only the increase in flow in the Otness drain ditch caused by installation of the drain tile system, not as a request for the entire flow of the Otness drain ditch.

9. The Applicant, by installing the drain tile system, has developed 110 gpm. (Finding of Facts 12-16.) The evidence further shows that this amount is consistently, physically present throughout the irrigation season. (Finding of Fact 11.)

⁴Thus, no decision need be made here regarding whether a developer of water who has not put such water to beneficial use for almost 20 years after it was originally developed, may subsequently assert the exclusive right to its use as against other appropriators who have made use of it.

Applicant has the right of exclusive use of the water developed by his efforts. Accordingly, there can be no legitimate calls for the 110 gpm. In other words, 110 gpm will be physically and legally available to Applicant throughout the proposed period of diversion. Therefore, for a flow of 110 gpm, the criterion set forth in § 85-2-311(1)(a), MCA is met. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley, March 21, 1988, Proposal for Decision, pp. 6-9. Accordingly, no permit may issue for a flow of more than 110 gpm or a volume of more than 89.44 acre-feet per year. (Finding of Fact 17.)

10. Irrigation is a beneficial use of the water. Section 85-2-102(2)(a), MCA. Further, because the Application is made, in part, for supplemental irrigation, it is probable that Applicant can beneficially use a lesser amount than requested. Therefore, it is hereby concluded that Applicant can make beneficial use of 110 gpm up to 89.44 acre-feet per annum.

11. The diversion system, i.e., the drain tile system, has been in place since 1984. It successfully diverts groundwater into the Otness ditch (Findings of Fact 10, 16). From there, water may be readily removed by pump, as proposed, for subsequent flood or sprinkler application. (Finding of Fact 3.) Such removal and application is a reasonable practice. Based on these factors, it is concluded that the proposed means of diversion, construction and operation of the appropriation works are adequate.

12. The proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved. (Finding of Fact 19.)

13. The point of diversion represents the point at which water is diverted from the source. Because the source is groundwater, the order will reflect the locality of the drain tile system as the point of diversion, not the points at which water is added to or removed from the Otness ditch.

WHEREFORE, based on the foregoing, the Examiner proposes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions and limitations set forth below, Application for Beneficial Water Use Permit No. 54693-g410 is hereby granted to Ronald and Lyle Otness, to appropriate 110 gpm up to 89.44 acre-feet per year, from April 1 to October 1, inclusive, each year, of groundwater diverted by tile drain system located in the W $\frac{1}{2}$ of Section 32, Township 25 North, Range 4 West, to be used for supplemental and new irrigation of 160 acres located in the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ of Section 32, Township 25 North, Range 2 West.

This Permit is issued subject to the following express conditions, limitations, and restrictions:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize

appropriations by the Permittees to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittees shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for Permit uses.

D. Permittees shall install adequate flow measuring devices at the point(s) water is removed from the Ottness ditch. Permittees shall keep written records of the flow and volume diverted by recording each date on which water is diverted, and the rate and duration of diversion on each such date. Permittee shall provide such records to the Department upon request.

E. In the Notice of Completion, Permittees shall describe with particularity the acreage to which water has been applied hereunder.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed

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and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.


Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the

parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 20 day of December, 1988.



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 20 day of December, 1988, as follows:

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